ZUBLIN MUHIBBAH JOINT VENTURE

v.

GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[ORIGINATING SUMMONS NO. R8-24-41-89]
19 JUNE 1989

ARBITRATION: *Foreign Counsel - Right of appearance in arbitration proceedings - Advocate and solicitor within Legal Profession Act 1976 - Whether arbitrator should have referred the dispute to High Court as special case stated - Sections 12, 13 and 22 Arbitration Act 1952, ss. 35(1), 36(1), 37(1), 40 Legal Profession Act 1976.*

LEGAL PROFESSION: *Arbitration proceedings - Representation by foreign Counsel - Foreign Counsel not an advocate and solicitor - Whether prohibited from representing parties to arbitration proceedings - Whether Legal Profession Act 1976 applies to arbitration proceedings - Sections 35(1), 36(1), 37(1), 40 Legal Profession Act 1976.*

The plaintiff and defendant were parties to a contract for construction of berths at the Johor Port. Disputes arose between them which was referred to an arbitrator pursuant to an arbitration agreement entered into between the parties. The plaintiffs local Counsel required the services of a particular foreign Counsel who had wide experience in international arbitration, to assist him in the arbitration proceedings. The defendants objected on the ground that the foreign Counsel was not an advocate and solicitor within the meaning of the Legal Profession Act 1976. The defendants also contended that the application by the plaintiff for declaration was not proper and the matter ought to have been referred to the High Court by the arbitrator as a special case stated.

Held:

[1] Foreign lawyers who are not advocates and solicitors within the meaning of the Legal Profession Act 1976, are not prohibited by the said Act from representing parties to arbitration proceedings in West Malaysia.

[2] The Legal Profession Act 1976 has no application to arbitration proceedings in West Malaysia.

[3] The application to the High Court for an order directing the arbitrator to state a special case for the decision of the Court could have been made by either party to the arbitration proceedings.

[4] Any person who assists a party in presenting his case in arbitration proceedings may also attend e.g., a shorthand writer, an assessor, an engineer, an architect, and such parties should not be excluded without good grounds when their presence are desired by a party.

[Order in terms of declaration sought by plaintiff.]

Case referred to:
Haigh v. Haigh [1861] 31 LJ Ch 420

Legislation referred to:
Arbitration Act 1952, ss. 12, 13, 19 to 21, 22
Legal Profession Act 1976, ss. 35(1), 36(1), 37(1), 39, 40

For the plaintiff - Davidson, Rajendra Navaratnam; M/s. Azman Davidson & Co.
For the defendant - Segara; Government of Malaysia
For the bar council - Peter Mooney

JUDGMENT

Eusoff Chin J:

The plaintiff, Zublin Muhibbah Joint Venture consists of a company called Ed Zublin AG of Germany, and a local company called Muhibbah Engineering (M) Sdn. Bhd. The plaintiff had entered into a contract with the Malaysian Government (the defendant) on 24 September 1981 to construct for the defendant three berths at Johor Port.

The plaintiff made claims and the Government (defendant) made counter claims under clause 67 of the contract, which went to an arbitrator.

The plaintiff retained a firm of advocates and solicitors M/s. Azman, Davidson and Co., to represent them in the proceedings before the arbitrator, Mr. C.H. Teoh.

Mr. Davidson who appeared for the plaintiff at the arbitration proceedings required one Mr. Mahir Jalili an American attorney who also holds a masters degree in Chemical Engineering to assist him to cross-examine witnesses because Mr. Jalili has had wide experience in international arbitration matters involving engineering contracts. Further, para. 8 of Davidson's affidavit states:

> 8. Mr. Mahir Jalili's role in these arbitration proceedings has up to the present stage been mainly concerned with preparation of witness statements, pleadings and documentary evidence. This has been both current and necessary since the principal witnesses of the claimants are resident in either London or West Germany and Mr. Mahir Jalili is in a better position than I am to work in conjunction with the headquarters of Ed Zublin AG which is situated at West Germany. Ed Zublin AG, through their local subsidiary Zublin (M) Sdn Bhd., were the managers of the joint venture. So in consequence the instructions came principally from them rather than from Muhibbah Engineering (M) Sdn Bhd., their Malaysian joint-venture partners.

Learned Senior Federal Counsel Mr. K.N. Segara, objected to Mr. Jalili's presence to assist Mr. Davidson on the ground that Mr. Jalili is not an advocate and solicitor under the Legal Profession Act 1976. The arbitrator being a non-legal man had asked the parties to sort out this objection. Hence this application to the High Court.

Mr. Davidson's firm had written to, and received a reply from the Bar Council Malaysia to the effect that the Bar Council was of the view that the Legal Profession Act does not apply to a foreign Counsel in an arbitration proceeding in Malaysia.

Having heard submissions from both parties, and Dato' Peter Mooney from the Bar Council, I gave a decision on 20 April 1989 that a person representing a party in an arbitration proceeding need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and that the said Act has no application to an arbitration proceeding in West Malaysia.

The declarations sought by the plaintiff before me are:

a) Foreign lawyers who are not advocates and solicitors within the meaning of the Legal Profession Act 1976, are not prohibited by the said Act from representing parties to arbitration proceedings in West Malaysia.

b) the said Act has no application to arbitration proceedings in West Malaysia.

The main objection by the learned Senior Federal Counsel is that Mr. Jalili has not been admitted as an advocate and solicitor of the High Court Malaya and since he is an unauthorised person within the meaning of s. 36(1) of the Legal Profession Act 1976, (Act 166), he is precluded to act for any party under s. 37 of that Act, and that even if he had acted, he is precluded from recovering any costs by the provision of s. 40 of the Act.

As regards the question of cost in an arbitration proceedings it is to be governed by the provision of ss. 19 to 21 of the Arbitration Act 1952 (Act 93).

For the purpose of this judgment it is necessary to quote here the relevant provisions of ss. 35(1), 36(1), 37(1) and 40 of the Legal Profession Act.

35. Right of Advocate and Solicitor.

(1) Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation.

36. Advocate and solicitor to have name on the roll before practice.

(1) Subject to this section, no person shall practice as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the roll and he has a valid practising certificate authorising him to do the act; a person who is not so qualified is in this Act referred to as an "unauthorised person".

37. No unauthorised person to act as advocate and solicitor.

(1) Any unauthorised person who:

(a) acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity, other than as a party to an action in which he is himself a party, sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts;

or

(b) wilfully or falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified or authorised to act as an advocate and solicitor, or that he is recognised by law so qualified or authorised,

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both.

40. No cost payable to unauthorised person.

(1) No costs in respect of anything done by an unauthorised person as an advocate and solicitor or in respect of any act which is an offence under ss. 37 or 39 shall be recoverable by any person in any action, suit or matter.

(2) Any payment to an authorised person for anything done which is an offence under ss. 37 or 39 may be recovered in a Court of competent jurisdiction by the person who has paid the money.

An advocate and solicitor who is a qualified person under s. 36(1) is given exclusive right by the law to appear and plead in all Courts of Justice in Malaysia. This s. 36(1) does not give exclusive right to him, nor prohibit him from appearing in other tribunals which are not Courts of Justice in this country. An unauthorised person is prohibited under pain of penalty from performing any of the acts mentioned in s. 37 of the Act. However, s. 37 of the Act is specified in the sense that those acts to be performed must be done in the Courts in Malaysia, or relating to any proceedings in any Court in Malaysia.

An arbitral forum is not a Court of Justice in Malaysia as envisaged by the Legal Profession Act 1976. It is a private tribunal. Subject to s. 12 of the Arbitration Act 1952, the arbitrator is appointed by the parties to an arbitration agreement to adjudicate on certain specific facts before him, and ultimately to settle the disputes between the contracting parties arising out of their contract. The parties who may appear before the arbitrator are those provided for by the arbitration agreement, or if the agreement does not so provide, then the provisions of s. 13 of the Arbitration Act shall apply. Any person who assists a party in presenting his case may also attend, e.g., a shorthand writer, an assessor, an engineer, an architect, and

such parties should not be excluded without good ground when their presence are desired by a party or the award of the arbitrator may be set aside. Thus in *Haigh v. Haigh* [1861] 31 LJ Ch 420, where one of the parties desired to have his son present because the son was versed in the accounts of the business, and the arbitrator excluded the son and also a shorthand writer, the award was set aside.

In the case before me, the claimant's (plaintiff) learned Counsel, Mr. Davidson desires the presence of Mr. Jalili whose engineering qualifications and experience would place him in a more advantageous position to assist Mr. Davidson to conduct the cross-examination of technical witnesses because there are many engineering issues which arise from the pleadings. Following *Haigh v. Haigh*, Mr. Jalili who is an American Attorney and chemical engineer, ought not to be excluded from appearing in the arbitration proceedings. Even if Mr. Jalili might have taken actions or performed the duties which normally are done by an advocate and solicitor in this country, he had done so not in or relating to a Court in Malaysia, but only in or relating to an arbitration proceeding. His actions therefore did not offend s. 37 of the Legal Profession Act 1976.

I also find that the law governing arbitration proceedings in Malaysia is the Arbitration Act 1952 (Revised - 1972) (Act 93) which came into force in Sarawak on 17 June 1952, and in other States on 1 November 1972, and that the Legal Profession Act 1976, has no application to arbitration proceedings in West Malaysia.

The learned Senior Federal Counsel in the course of his submission also challenged this application as being improperly brought to this Court. He submitted that the arbitrator should have taken action under s. 22 of the Arbitration Act, which states:

> 22 (1) An arbitrator or umpire may, and shall if so directed by the High Court, state:
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> (a) any question of law arising in the course of the reference; or
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> (b) an award or any part of an award, in the form of a special case for the decision of the High Court.
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> (2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.
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> (3) A decision of the High Court under this section shall be deemed to be a judgement of the High Court within the meaning of s. 67 of the Courts of Judicature Act 1964 (which relates to the jurisdiction of the Federal Court to hear and determine appeals from any judgment of the High Court), but no appeal shall lie from the decision of the High Court on any case stated under s. (1)(a) without the leave of the High Court or of the Federal Court.

It is to be borne in mind that the arbitrator here is a non legally qualified person. There is nothing to stop the claimant or the respondent in the arbitration proceedings to apply to the High Court for an order directing the arbitrator to state a special case for the decision of the Court. The respondent in the arbitration proceedings should initiate that application since the respondent is the one objecting to Mr. Jalili's assisting the claimant's solicitors in that arbitration proceedings. Further, for the arbitrator to state a case under s. 22 of the Act, he may need the services of a solicitor to assist him to do so. I, therefore, am of the view that I should not direct the arbitrator to state a case to the High Court but to proceed with this application before me and give a decision notwithstanding that my decision may be appealed against to the Supreme Court without leave required, as would have been the case if this matter had come to me under s. 22(3) of the Act.

Also found at [1990] 2 CLJ 112